TEE LIAN JOO

v.

TEE TIONG LIAN

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[BANKRUPTCY NO: (MT-1) 29-1005-2005]
5 DECEMBER 2008

BANKRUPTCY: *Notice - Setting aside - Extension of time to file application to set aside bankruptcy notice and creditor's petition - Whether notice of appeal filed out of time - Rules of the High Court 1980, O. 56 r. 3 - Whether appeal properly brought*

BANKRUPTCY: *Notice - Setting aside - Extension of time to file application to set aside bankruptcy notice and creditor's petition - Whether application to set aside bankruptcy notice filed out of time - Whether judgment debtor's supporting affidavit adverted to any counter claim, set off or cross demand - Whether judgment debtor's application incompetent - Bankruptcy Act 1967, s. 3(1)(i) - Bankruptcy Rules 1969, r. 95*

BANKRUPTCY: *Notice - Setting aside - Extension of time to file application to set aside bankruptcy notice and creditor's petition - Whether ought to have obtained sanction of official assignee prior - Whether judgment debtor has locus standi to make appeal*

The judgment debtor's appeal herein was against the decision of the senior assistant registrar in dismissing the judgment's debtor's summons in chambers (JD's application). The JD's application was for (i) an extension of time to file the application to set aside the bankruptcy notice ("BN') and creditor's petition and (ii) an order to set aside the bankruptcy notice and creditor's petition. The judgment creditor, however, raised the following preliminary objections which were (1) the notice of appeal was filed out of time; (2) the JD's application to set aside the BN was also filed out of time and (3) the judgment debtor had no *locus standi* as he was an undischarged bankrupt.

Held (dismissing judgment debtor's appeal):

(1) The order appealed against was dated 24 August 2006 and the notice of appeal was filed on 6 September 2006. Order 56 r. 3 of the Rules of the High Court 1980 prescribes a ten

A day period within which the notice of appeal must be issued. The computation of the ten day period ran immediately after 24 August 2004. Accordingly, the first day fell on 25 August 2005 and the tenth day expired on 3 September 2006. The notice of appeal was out of time for being issued three days
B after the specified date. The appeal herein was not properly brought. (para 4)

(2) The BN was served on the judgment debtor on 24 April 2005 and the judgment debtor's application and affidavit was filed
C on 2 August 2006; about 15 months later. In order to challenge a BN, a debtor should within seven days after service of the BN satisfy the court that he had a counter claim, set off or cross demand which equaled or exceeded the amount of the judgment debt (s. 3(1)(i) of the Bankruptcy Act
D 1967. The filing of an affidavit operates as an application to set aside BN (r. 95 Bankruptcy Rules 1969). Herein, the judgment debtor's application to set aside the BN was filed out of time. There was nothing in the judgment debtor's supporting affidavit adverting to any counter claim, set off or
E cross demand and there was also no evidence warranting such circumvention. The JD's application was incompetent. (para 7)

(3) The JD's application was not an application for review, rescinding, varying or annulling a bankruptcy order. The
F judgment debtor ought to have obtained the sanction of the official assignee prior to making the JD's application Accordingly, the judgment debtor did not have *locus standi* to make this appeal. (para 9)

(4) The judgment debtor further contended that the interest
G charged on the gross sum in the BN was erroneous, far excessive and incorrect. However, it was rather late in the day for the judgment debtor to take up this issue. The sums claimed in the BN were pursuant to the orders dated 20 November 2003 and 17 February 2004. The judgment
H debtor had not taken any steps to set aside the said orders. The judgment debtor could not now ask the Bankruptcy Court to go behind the orders. The judgment debtor was guilty of laches on account of his failure to take any steps to set aside the said orders. (para 12)

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Case(s) referred to:

Bathmani Suppiah v. Southern Finance Company Bhd (Bankruptcy No: 29-349-98) (Unreported) ***(foll)***

Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC ***(refd)***

J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd [2000] 3 CLJ 104 CA ***(refd)***

Lee Bak Soon v. RHB Bank Bhd [2008] 1 CLJ 237 CA ***(refd)***

Re Annie Lim [1986] 1 LNS 13 ***(refd)***

Re Chen Chong Fatt Willy Ex Parte Hitachi Lease (Singapore) Pte Ltd [1986] 1 LNS 74 ***(refd)***

Re Dr R Ramachandran; Ex-Parte: Ganeswary Ponnudurai [2002] 1 LNS 296 ***(refd)***

Re Khoo Chee Tong; Ex Parte Unik (Malaysia) Sdn Bhd [1996] 2 BLJ 475 HC ***(refd)***

Re Khoo Kim Hock [1974] 1 LNS 134 ***(foll)***

Re Low Kok Tuan; ex p Arab Malaysian Merchant Bank Bhd [1997] 4 CLJ 185 HC ***(refd)***

Re Naspu Daud; ex p Affin Bank Berhad [2008] 1 CLJ 723 HC ***(refd)***

Sovereign General Insurance Sdn Bhd v. Koh Tian Bee [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 SC ***(refd)***

Yogananthy AS Thambaiya lwn. Idris Osman [2006] 1 CLJ 430 CA ***(refd)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 38(1)(a), 92(1), (2), 105(1)
Bankruptcy Rules 1969, rr. 95, 275
Rules of the High Court 1980, O. 3 r. 2(2), O. 56 rr. 2(2), 3

Other source(s) referred to:

Zainur Zakaria, *Setting Aside Bankruptcy Notice – Going Behind the Judgment [1992] 2 MLJ ccx*

For the judgment debtor/appellant - Jayaperakash; M/s Tam Cheng Yau & Co
For the judgment creditor/respondent - BC Tay (AB Chew with him); M/s Arthur Lee & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The judgment debtor's appeal to the judge in chambers is against the decision of the learned senior assistant registrar given on 24 August 2006 dismissing the judgment debtor's summons in chambers (JD's application'). The JD's application is for (i) an

A extension of time to file the application to set aside the bankruptcy notice ('BN') and creditor's petition and (ii) and order to set aside the bankruptcy notice and creditor's petition.

Preliminary Issues

B **[2]** At the hearing of the appeal learned counsel for the judgment creditor raised the following preliminary objections:

(1) The notice of appeal was filed out of time;

C (2) The JD's application to set aside the BN was also filed out of time; and

(3) The judgment debtor has no *locus standi* as he is an undischarged bankrupt.

D **[3]** On the first point it was submitted that orders in bankruptcy matters shall be subject to appeal in the same way as orders of the High Court (s. 92(2) Bankruptcy Act 1967 ('the Act')). Accordingly, the notice of appeal must be issued within ten days of the judgment, order or decision appealed against (O. 56 r. 3 E Rules of the High Court 1980). The order of the SAR in question is dated 24 August 2006. The notice of appeal dated 4 September 2006 was filed on 6 September 2006. The notice of appeal is three days out of time. In the premises the appeal is not proper before the court. Learned counsel referred to *Yogananthy AS* F *Thambaiya v. Idris Osman* [2006] 2 MLJ 101 where the Court of Appeal held at p. 102: "Because it was filed after the time fixed for appeal; which was on 5 December 2000, the said appeal was not appropriately brought before this court." In reply learned counsel for the judgment debtor only contended that the notice G of appeal is not out of time.

[4] On this issue the order appealed against is dated 24 August 2006 and it is undisputed that the notice of appeal was in fact filed on 6 September 2006. Order 56 r. 3 RHC prescribed a ten H day period within which the notice of appeal must be issued. The computation of the ten day period runs immediately after 24 August 2004. Accordingly the first day falls on 25 August 2006 and the tenth day expires on 3 September 2006. This method of computation is also consistent with O. 3 r. 2(2) RHC I which provides that where "the act is required to be done within

or not less than a specified period before a specified date, the specified period ends immediately before that date." On the aforesaid premises, even assuming that the notice of appeal was issued on the date of filing (6 September 2006) it is clear that the notice of appeal is out of time for being issued three days after the specified date. The provisions of O. 56 r. 2(2) RHC prescribing that the notice "must be issued within ten days" is mandatory. There is no explanation on the part of the judgment debtor accounting for the delay in filing the notice of appeal; no good cause or special circumstances were shown. No explanation was also offered by the judgment debtor as to why the judgment debtor failed to file an application for an extension of time to file the notice of appeal out of time. In the premises the court finds that the appeal is not properly brought.

[5] Secondly, even if the notice of appeal is within time, learned counsel for the judgment creditor submitted that the JD's application is out of time. The judgment debtor is mandatorily required to give notice of dispute, if any, within seven days after service of the BN on him. Non-compliance to comply with the prescribed time for filing of notice of dispute is fatal (*Development & Commercial Bank Bhd v. Datuk Ong Kian Seng* [1995] 3 CLJ 307 FC). The BN was served on the judgment debtor on 24 April 2005 and the judgment debtor's application and affidavit was filed on 2 August 2006; about 15 months later. The time for filing the notice of dispute prescribed by s. 3(1)(i) of the Act is mandatory and the judgment debtor must act within the time limit prescribed therein (*J Raju M Kerpaya v. Commerce International Merchant Bankers Bhd* [2000] 3 CLJ 104 CA).

[6] In reply learned counsel for the judgment debtor argued that the judgment debtor was aware of the existence of the proceedings at the stage when he was served with the creditor's petition. It was contended on the authority of *Re Naspu Daud; ex p Affin Bank Berhad* [2008] 1 CLJ 723 that the Bankruptcy Rules 1969 and the Act was not substantive law but a procedural requirement. Therefore the judgment creditor's contention does not hold water.

[7] In order to challenge a BN, a debtor should within seven days after service of the BN satisfy the court that he has a counter-claim, set off or cross demand which equals or exceeds the amount of the judgment debt (see s. 3(1)(i)). A debtor intending to set aside the BN should file an affidavit as required under the Bankruptcy Rules. The filing of an affidavit operates as an application to set aside of BN (see r. 95 Bankruptcy Rules, 1969). In this case the judgment debtor's application to set aside the BN was filed out of time. An application for an extension or abridgement of time ought to have been made timeously. The judgment debtor did not make any application. In this particular instance, if an application was made, and there were special circumstances and good cause the court may have exercised its discretion and granted an abridgement or extension of time for the filing of the judgment debtor's application (see r. 275). This discretionary power is to ensure that there is no miscarriage of justice occasioned by mere non-compliance of procedural rules. In order to move the court to exercise its discretion there must be some cogent evidence before the court warranting the circumvention of the strict rules. In this instance, however, there is nothing in the judgment debtor's supporting affidavit adverting to any counter-claim, set off or cross demand and there is also no evidence warranting such circumvention. In the premises the JD's application is incompetent.

[8] Thirdly, learned counsel for the judgment creditor submitted that the judgment debtor being an undischarged bankrupt has no *locus standi* to make this appeal without the written sanction of the official assignee. Learned counsel cited *Bathmani Suppiah v. Southern Finance Company Bhd* (Bankruptcy No. 29-349-98 Ipoh High Court unreported). In reply, learned counsel for the judgment debtor contended that this is an appeal against the decision of the SAR in granting an AO and RO and that as the judgment debtor's application was made pursuant to the bankruptcy proceedings itself the sanction is not necessary. In support of this contention learned counsel cited *Bathmani Suppiah, supra* and *Re: Khoo Kim Hock* [1974] 1 LNS 134.

[9] On this issue it is pertinent to note that the JD's application is a summons in chamber to set aside the BN. According to *Khoo Kim Hock, supra* the prohibition in s. 38(1)(a) of the Act does not exclude a bankrupt from applying for a review, rescission or

variation of an order of bankruptcy under s. 92(1) or s. 105(1) of the Act. *Khoo Kim Hock, supra* did not touch on the bankrupt's capacity to appeal or to apply for a stay of proceedings without the sanction of the official assignee. In *Re Low Kok Tuan; ex p Arab Malaysian Merchant Bank Bhd* [1997] 4 CLJ 185 Low Hop Bing J (as he then was) took the view that this deliberate omission by the legislature in regard to appeals or stay in s. 92(1) and s. 105(1) of the Act would mean only one thing that unlike provisions for review, rescinding, varying or annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official assignee should be obtained. This court is in accord with the views of the learned judges in *Bathmani Suppiah* and *Khoo Kim Hock, supra*. The JD's application is not an application for review, rescinding, varying or annulling a bankruptcy order. The judgment debtor ought to have obtained the sanction of the official assignee prior to making the JD's application. Accordingly, it is this court's finding that the judgment debtor does not have *locus standi* to make this appeal.

Issues On Merits

[10] Learned counsel for the judgment debtor submitted that the judgment creditor (a Singaporean) had never deposed the affidavit in support of the creditor's petition affirmed on 26 May 2005. In reply thereto the judgment creditor exhibited a photocopy of her passport evidencing her entry into Malaysia on 26 May 2005 the date when she deposed her affidavit. In the light of this evidence in rebuttal the judgment debtor's contention is without merit.

[11] Learned counsel for the judgment debtor also contended that the Bankruptcy Court can go behind the judgment on the grounds that the mode of proceedings leading to the judgment being obtained was clouded with secrecy, irregularities, fraud, collusion and miscarriage of justice. In support thereof learned counsel referred to passages from an article entitled *Setting Aside Bankruptcy Notice – Going Behind the Judgment* by Zainur Zakaria [1992] 2 MLJ ccx. In reply, learned counsel for the judgment creditor submitted that the bankruptcy court cannot go behind the judgment; the validity of a judgment debt will only be inquired into when there is evidence of fraud, collusion or miscarriage of justice (*Re Annie*

A *Lim* [1986] 1 LNS 13 and *Sovereign General Insurance Sdn Bhd v. Koh Tian Bee* [1988] 1 CLJ 155; [1988] 1 CLJ (Rep) 277 and *Re Khoo Chee Tong; Ex Parte Unik (Malaysia) Sdn Bhd* [1996] 2 BLJ 475).

B **[12]** It is settled law that where there is evidence of fraud, collusion or miscarriage of justice a bankruptcy court will look into the validity of a judgment debt (see *Sovereign General Insurance Sdn Bhd and Re Khoo Chee Tong supra*). Is there any evidence of fraud, collusion or miscarriage of justice? The judgment debtor's C contention in this regard is that the interest charged on the gross sum in the BN is erroneous, far excessive and incorrect. It is rather late in the day for the judgment debtor to take up this issue. The sums claimed in the BN are pursuant to the orders dated 20 November 2003 and 17 February 2004. The judgment D debtor has not taken any steps to set aside the said orders. The judgment debtor cannot now ask the bankruptcy court to go behind the orders. The judgment debtor is guilty of laches on account of his failure to take any steps to set aside the said orders. In *Lee Bak Soon v. RHB Bank Bhd* [2008] 1 CLJ 237 Low E Hop Bing JCA speaking for the Court of Appeal said at p 245: "... the JD's failure, refusal or neglect to raise the aforesaid grounds in the proper forum *viz* either in the civil suit, the auction suit or the Supreme Court case clearly demonstrates a total lack of *bona fide* on the part of the JD." The Court of Appeal endorsed F the principles in *Sovereign General Insurance* and *Re Khoo Chee Tong, supra* where the court dismissed the JD's attempt to set aside the BN on the ground, *inter alia*, that the judgment on which the BN was based was tainted with illegality.

G **[13]** Learned counsel for the judgment debtor contended that the gross sum claimed in the BN is bad in law as it is based on two orders dated 20 November 2003 and 17 February 2004 (*Re: Dr. R. Ramachandran Ex-Parte: Ganeswary Ponnudurai* [2002] 1 LNS 296; *Re Chen Chong Fatt Willy Ex Parte Hitachi Lease (Singapore) Pte Ltd* [1986] 1 LNS 74; r. 91(2) Bankruptcy Rules 1969). H According to the particulars of claim set out in the BN the judgment debtor is indebted in the total sum of RM402,529.97 under the orders dated 20 November 2003 and 17 February 2004. Both orders are issued under the same Guaman Sivil No. I MT3-22-530-2003. The sums stated to be due and payable under

the order dated 17 February 2004 are consequential to the order dated 23 November 2003. In the premises the judgment debtor's contention is misconceived and unsubstantiated.

[14] For the abovementioned reasons the judgment debtor's appeal is dismissed with costs.